

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1384

To be argued by
HUGH W. CUTHBERTSON

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

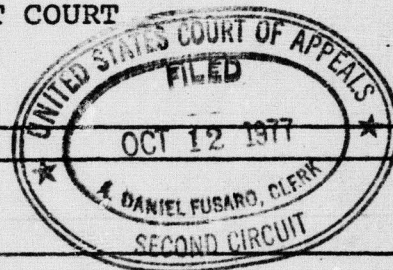
Docket No. 77-1384

IN RE THOMAS A. LIBERATORE,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1384

IN RE THOMAS A. LIBERATORE,

Appellant.

BRIEF FOR THE APPELLEE

Issues Presented

- I. Whether a federal district judge has the power to impose a civil contempt sentence upon a state prisoner and suspend service of the state sentence during the contempt confinement in order to give coercive effect to the court's contempt power?
- II. Whether the appellant was given adequate notice and a reasonable time for the preparation of a defense prior to being held in civil contempt pursuant to 28 U.S.C. § 1826(a)?
- III. Whether the Government demonstrated that the grand jury's request for exemplars of the appellant's handwriting and fingerprints was proper?

Statement of the Case

This is an appeal from an order of the United States District Court for the District of Connecticut (Clarie, C.J.), entered June 29, 1977, adjudging the appellant, Thomas A. Liberatore, in contempt, pursuant to 28 U.S.C. § 1826(a), for his refusal to provide handwriting exemplars and fingerprints to a federal grand jury. The order directed that Liberatore be confined for the remainder of the term of the grand jury or until he provided the requested items. The court indicated orally on June 29, 1977 that the ordered confinement would interrupt the running of a state sentence, which Liberatore was then serving. By order dated August 2, 1977, the court formally directed that service of Liberatore's state sentence be interrupted by his confinement for contempt.

Notice of appeal to this court was filed on August 24, 1977.

Statement of Facts

On June 14, 1977, the Government by application obtained a writ of habeas corpus ad testificandum to secure Liberatore's presence on June 29, 1977 before a federal grand jury in Hartford, Connecticut. Liberatore was a state prisoner at the Connecticut Correctional Institution in Somers (Somers) and was expected to be released therefrom on January 19, 1978. The grand jury's term expired on April 13, 1978.

Liberatore appeared on June 29, 1977 before the grand jury, which was investigating, inter alia, the forging, uttering and possession of two United States Treasury checks which had been stolen from the mail, and was directed by the foreman of the grand jury to provide exemplars of his handwriting and a set of major case fingerprints.^{1/} Liberatore refused and the Government made application to the court for an order compelling Liberatore to provide the items sought.

A hearing was held on the Government's application, during which the Government filed an affidavit outlining the scope of the grand jury's inquiry and attesting to the relevance and necessity of the evidence sought. (App. 25-26). The foreman of the grand jury also testified that this evidence was necessary and essential to the grand jury's investigation and that Liberatore had been ordered to provide them but had refused to do so. (App. 9-12). After the court heard argument from counsel, it ordered Liberatore to comply with the grand jury's request for his exemplars. (App. 19). The court then explained to Liberatore that if he persisted in his refusal, he

^{1/} "Major case fingerprints" include impressions of the palms as well as the sides of the hand and fingers. (App. 17).*

* References marked "App." refer to the appendix of Liberatore's brief on appeal.

would be held in contempt and confined for the remainder of the grand jury's term or until he complied with the court's order. The court further explained to Liberatore that any time he served in connection with a finding of contempt would not count toward service of his state sentence. (App. 20-21). Upon Liberatore's indication that he would not obey the court's order, he was held in contempt. (App. 21). The court filed an order later that day so holding and directing Liberatore's confinement for the duration of the grand jury's term or until he complied with the court's order. (App. 28). This order by its terms did not direct the suspension of Liberatore's state sentence during his confinement for contempt.

On July 29, 1977, Liberatore filed a memorandum of law with the court and requested that it be considered prior to issuing any further order which might expressly direct the suspension of Liberatore's state sentence during the period of his contempt. The memorandum raised for the first time the claim that Liberatore was given neither adequate notice nor a reasonable opportunity to prepare a defense prior to being held in contempt by the court. The memorandum advanced as well those other issues now raised on appeal.

On August 2, 1977, the court filed a substitute order which amended its order of June 29, 1977 by providing expressly

that Liberatore's commitment for contempt would interrupt any credit received by him on his state sentence. (App. 29-30).

Liberatore is presently confined as a federal prisoner at Somers and has since June 29, 1977, received no credit toward the service of his state sentence.

A R G U M E N T

I.

A federal district judge has the power to impose a civil contempt sentence upon a state prisoner and suspend service of the state sentence during the contempt confinement in order to give coercive effect to the court's contempt power.

It is beyond question that courts have the inherent power to enforce compliance with their lawful orders through civil contempt. Lefkowitz v. Turley, 414 U.S. 70, 84 (1973); Shillitani v. United States, 384 U.S. 364, 370 (1966); United States v. Barnett, 376 U.S. 681, 753-754 (1964) (Goldberg, J., dissenting); United States v. United Mine Workers, 330 U.S. 258, 303, 330-332 (1947) (Black and Douglas, JJ., concurring in part and dissenting in part). It is also firmly established that federal courts may compel persons to appear and testify before a grand jury. United States v. Calandra, 414 U.S. 338, 345 (1974); Kastigar v. United States, 406 U.S. 441, 443 (1972). Where, therefore, a witness refuses to obey a court order to provide a grand jury with unprivileged testimony or other evidence, he may be held in civil contempt and confined until compliance.

Shillitani v. United States, supra, 384 U.S. at 370. Such confinement is coercive in nature and designed to compel obedience with the court's order. Shillitani v. United States, supra, 384 U.S. at 368; Penfield Co. v. S.E.C., 330 U.S. 585, 590 (1947); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 449 (1911).

In 1970 Congress codified this practice by passage of the Recalcitrant Witness Statute, 28 U.S.C. § 1826(a), which empowers a federal court to confine a witness who, without just cause, refuses its order to provide evidence to a grand jury.^{2/} The express purpose of this statute is to secure the testimony of grand jury witnesses through the use of a civil sanction--confinement. See H.R.Rep. No. 1549, 91st Cong., 2d Sess. (1970), reprinted in 2 U.S. Code Cong. & Admin. News 4007, 4022 (1970).

2/ 28 U.S.C. § 1826(a) specifically provides:

Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of--

- (1) the court proceeding, or
- (2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

Although the statute is silent as to the effect of such confinement upon the service of pending criminal sentences, the congressional intent to coerce compliance with a court's order by a recalcitrant witness could not be more plain. Liberator's claim that the confinement authorized by this section can have no effect upon the running of a pre-existing criminal sentence is in wholesale contradiction of the express congressional intent that such confinement act as a sanction to secure testimony or other information which is sought by a grand jury. His position, moreover, has been squarely rejected by every court that has considered the question. See In re Grand Jury Investigation (Appeal of Hartzell), 542 F.2d 166 (3d Cir. 1976), cert. denied, 429 U.S. 1047 (1977); In re Grand Jury Proceedings (United States v. Thurmond), 534 F.2d 41 (5th Cir. 1976); In re Grand Jury Proceedings (United States v. Marshall), 532 F.2d 410 (5th Cir.), cert. denied, 429 U.S. 924 (1976); Martin v. United States, 517 F.2d 906 (8th Cir.), cert. denied, 423 U.S. 856 (1975); Williamson v. Saxbe, 513 F.2d 1309 (6th Cir. 1975); United States v. Liddy, 510 F.2d 669 (D.C. Cir. 1974), cert. denied, 420 U.S. 980 (1975); Anglin v. Johnston, 504 F.2d 1165 (7th Cir. 1974), cert. denied, 420 U.S. 962 (1975); cf. United States v. Wilson, 421 U.S. 309, 321 n.2 (1975) (Blackmun and Rehnquist, JJ., concurring); In re Grand Jury Proceedings (United States v. Shocker), 541 F.2d 464 (5th Cir. 1976).

These decisions are grounded upon the very real concern that if time in prison for contempt were credited toward the service of a pre-existing sentence, the clearly articulated congressional goal of coercing a witness to testify would be completely frustrated. Congress plainly did not intend that the civil contempt sanction should not be available for already incarcerated contemnors. In re Grand Jury Investigation (Hartzell), supra, 542 F.2d at 169; Martin v. United States, supra, 517 F.2d at 908. On a more fundamental level, moreover, these decisions recognize, we submit, the basic principle that courts must be able to act promptly and enforce effectively their judgments and orders if they are to act at all. See Gompers v. Bucks Stove & Range Co., supra, 221 U.S. at 451. Clearly, in order to give meaning and coercive impact to the court's contempt powers in the interest of protecting the court's integrity it was necessary and proper for Judge Clarie to direct the interruption of Liberatore's state sentence pending his confinement for contempt. See United States v. Liddy, supra, 510 F.2d at 675.^{3/}

^{3/} The alternatives suggested by Liberatore (Brief, at 29-32)--the concurrent service of his contempt confinement with his state sentence or the imposition of a criminal contempt sentence--are plainly unsatisfactory. The former would deprive the court's order of any coercive effect until January 1978 and would even then reduce the possible period of confinement from nine to three months. This result would remove any incentive at all to comply with the court's order, see Martin v. United States, supra, 517 F.2d at 908, 909, and would, furthermore, delay and, hence, impede the grand jury's (footnote continued on page 9)

The foregoing decisions, which involve the interruption by a federal court of the running of a prisoner's federal criminal sentence, have no less application, we submit, to the interruption by a federal court of a prisoner's state sentence. Just as Congress did not intend that § 1826(a) would provide a useless remedy against prisoners who were serving federal sentences, In re Grand Jury Investigation (Hartzell), supra; Martin v. United States, supra, neither could it have intended that state prisoners would be immune from its sanctions. To conclude otherwise would simply excuse any state prisoner from having to testify in federal court or before any federal grand jury, a result plainly not contemplated.^{4/}

(footnote 3 continued) investigation. Criminal contempt, on the other hand, would result in a fixed sentence which would have to be served regardless of whether there was subsequent compliance with the court's order and suffers, therefore, from the same lack of coercive effect as a concurrent civil contempt sentence. It has, moreover, been rejected as an alternative by those courts that have considered it under these circumstances. See In re Grand Jury Investigation (Hartzell), supra, 542 F.2d at 169; United States v. Liddy, supra, 510 F.2d at 675.

4/ Liberatore's claim (Brief, at 16-17) that the foregoing decisions turn solely upon the operation of 18 U.S.C. § 3568, the statute which computes the terms of federal sentences, is inaccurate. As stated above, these decisions are grounded upon the recognition that to credit time in prison for contempt toward a pre-existing sentence would vitiate the intended coercive incentive to testify and would seriously interfere with the power of district courts to enforce their orders through civil contempt. See In re Grand Jury Investigation (Hartzell), supra, (footnote continued on page 10)

Liberatore's extensive discussion (Brief, at 19-29) of the general principles of federalism, while edifying, does not have any bearing upon the facts at hand. For example, this case does not involve an attempt by a federal court either to intervene in or enjoin a state criminal prosecution as in Stefanelli v. Minard, 342 U.S. 117 (1951) and Younger v. Harris, 401 U.S. 37 (1971), decisions upon which Liberatore relies. (Brief, at 20, 28-29). This case does not concern, moreover, an attempt by a federal court to inject itself into the internal disciplinary affairs of a state agency as in Rizzo v. Goode, 423 U.S. 362 (1976), where the court fashioned a complaint procedure for the police department in Philadelphia. (Brief, at 21, 28). This case, furthermore, does not represent an impermissible intrusion by Congress into the area of state

(footnote 4 continued) 542 F.2d at 169; In re Grand Jury Proceedings (Thurmond), supra, 534 F.2d at 42; In re Grand Jury Proceedings (Marshall), supra, 532 F.2d at 411-412; Williamson v. Saxbe, supra, 513 F.2d at 1310-1311; United States v. Liddy, supra, 510 F.2d at 675; Anglin v. Johnston, supra, 504 F.2d at 1169; cf. Martin v. United States, supra, 517 F.2d at 909-910. Quite obviously any decision which allows the interruption of a federal sentence must take into account the effect of 18 U.S.C. § 3568, which controls the computation of such sentences. These decisions, however, merely hold that § 3568 poses no bar to the interruption of a federal sentence for the service of a contempt sentence; they do not rest solely upon the operation of that statute.

sovereignty as in National League of Cities v. Usery, 426 U.S. 833 (1976), where the 1974 amendments to the Fair Labor Standards Act were held unconstitutional insofar as they operated to displace a state's ability to prescribe the minimum wages and maximum hours applicable to state employees. (Brief, at 28).

Judge Clarie's order does not interfere with the judgment of a state court, for it merely postpones the running of a state sentence while a state prisoner is confined federally for contempt.^{5/} The State of Connecticut's interest is neither infringed nor impaired, for the term of imprisonment to which Liberatore was originally sentenced by the State is preserved and will be carried out upon the expiration of the confinement for contempt.

Analytically, moreover, there is no conflict of federalism, for there are no competing claims of authority over Liberatore--the State is not a party in this appeal and has qua state raised no claim at all with respect to the

^{5/} To the extent that the court's order may be construed as an injunction staying a state court proceeding, see 28 U.S.C. § 2283, it is, we submit, an exception to this provision inasmuch as it is necessary to protect or effectuate the court's judgment.

interruption of Liberatore's sentence.^{6/} While there is no question that the powers of the Federal Government are not unlimited, Liberatore's general reliance upon the principles of federalism is on the facts of this case plainly insufficient to invalidate Judge Clarie's order.

II.

Liberatore was given adequate notice and a reasonable time for the preparation of a defense prior to being held in contempt.

Liberatore claims that he was given neither adequate notice nor a reasonable time to prepare a defense prior to his contempt hearing. This claim is without merit.

A contempt proceeding under 18 U.S.C. § 1826(a) is civil in nature. However, in view of the burden of imprisonment, this court has held that a witness proceeded against under § 1826(a) is entitled to the procedure prescribed by Rule 42(b) of the Federal Rules of Criminal Procedure, i.e., notice and a reasonable time to prepare a defense. In re DiBella, 518 F.2d

^{6/} In this regard, it is appropriate to note that ordinarily someone who has violated the criminal statutes of both the federal and state governments may not complain of or choose the manner or order in which he is tried or punished for such offenses. Hayward v. Looney, 246 F.2d 56 (10th Cir. 1957); United States ex rel. Moses v. Kipp, 232 F.2d 147 (7th Cir. 1956); Zahn v. Kipp, 218 F.2d 898 (7th Cir. 1955); Gunton v. Squier, 185 F.2d 470 (9th Cir. 1950).

955, 959 (2d Cir. 1975); In re Sadin, 509 F.2d 1252, 1255 (2d Cir. 1975). But see In re Persico, 491 F.2d 1156, 1162 (2d Cir. 1974). Although a witness must be given a meaningful opportunity to present his defense at a hearing under § 1826(a), "this summary procedure does not require meaningless formalities that would only serve to delay the proceedings." In re Bianchi, 542 F.2d 98, 101 (1st Cir. 1976). Thus, where an individual has actual notice of the nature of the proceedings, he cannot complain that such notice was not formal. United States v. Handler, 476 F.2d 709, 712 (2d Cir. 1973). Likewise, how much time is reasonable for the preparation of a defense is committed to the discretion of the court and will vary according to the circumstances of the case. In re Sadin, supra, 509 F.2d at 1255. The test is simply whether there has been an adequate opportunity to raise claims and have them determined by the court. In re Bonk, 527 F.2d 120, 127 (7th Cir. 1975).

In the case at bar, the Government is prepared to prove that on the morning of June 29, 1977, when Liberatore arrived at the Federal Building in Hartford, he conferred with the Assistant Federal Public Defender, who had been fully briefed by the Government, regarding the scheduled proceedings. Thus, Liberatore had notice prior to appearing before the grand jury that he would be directed to furnish exemplars of his handwriting

and fingerprints. He was well aware, moreover, that in the event of his refusal, the Government would request the court to order him to comply with the grand jury's directive. Furthermore, he had been advised that refusal to obey the court's order could result in his being held in contempt. Throughout the proceedings which followed, Liberatore was advised by counsel^{7/} and thus well understood the legal consequences of each decision he made. (See App. 6). No more was required in the way of notice.

With respect to Liberatore's claim that he did not have a reasonable time to prepare a defense, it is clear at the outset that none was available to him. During the hearing before the court the only defense suggested was that the evidence sought may have been unnecessary inasmuch as Liberatore's fingerprints and samples of his handwriting were available in his state prison file. (App. 16-18). Liberatore also claimed that there was other evidence available upon which an indictment could be returned. (App. 14).

The Government, however, is not required to make any showing that the handwriting exemplars and fingerprints could not be obtained from other sources. See United States v.

^{7/} The Assistant Federal Public Defender was formally appointed as Liberatore's counsel later that day. (App. 4).

Dionisio, 410 U.S. 1, 17 n.16 (1973); United States v. Mara, 410 U.S. 19, 21-22 (1973). As the Assistant United States Attorney indicated, moreover, the handwriting exemplars were to be used as a standard of comparison to determine whether Liberatore had forged two treasury checks and it was necessary for Liberatore to complete one or more standard Government handwriting forms. (App. 17, 25-26). With respect to the fingerprints, Liberatore had been directed to supply major case prints, which were not on file at the prison. (App. 17-18). The Government's showing was more than adequate. See, United States v. Vignera, 307 F.Supp. 136, 137-138 (S.D.N.Y. 1969). With respect to Liberatore's claim that the grand jury could have returned an indictment without the requested evidence, it is clear that a grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." Branzburg v. Hayes, 408 U.S. 665, 700 (1972), citing United States v. Stone, 429 F.2d 138, 140 (2d Cir. 1970). It is the grand jury, moreover, and not Liberatore which is charged with the investigatory function, see United States v. Calandra, supra, 414 U.S. at 345, and it is only after it has examined all of the evidence that a determination of whether to return an indictment can be made. Branzburg v. Hayes, supra, 408 U.S. at 701-702.

The court properly rejected as a valid defense Liberatore's claim that the grand jury did not need this evidence. No other claim was advanced by Liberatore during the hearing and no request was made that additional time was required to prepare or raise any other defenses. It was not until Liberatore filed his memorandum of law with the court a full month after he had been held in contempt that he made the claim that he had not had sufficient time prior to the contempt hearing to prepare a defense. Liberatore's memorandum, however, still proposed no defense which he sought to advance, but merely suggested that, had he been given more time, he may have shown that the handwriting sought was the product of an illegal wiretap, that the evidence was beyond the scope of the grand jury or pertained to an already existing indictment, or that the evidence was unnecessary in view of the existence of documents elsewhere.

As will be demonstrated, infra, the Government adequately showed that the evidence sought was within the scope of the grand jury's investigation. Liberatore's claim of necessity, as indicated above, was similarly presented and properly rejected by the court. Liberatore's suggestion that he may have been able to show that the evidence sought was the product of an illegal wiretap has little bearing on the issue,

for he did not in his memorandum nor does he now on appeal claim that electronic surveillance was in fact used by the Government in order to obtain information about him. While it is a defense to a charge of contempt that evidence sought was based upon an illegal interception of a grand jury witness' communications, Gelbard v. United States, 408 U.S. 41 (1972), this defense is not established by a mere assertion of misconduct; it requires much more--a "substantial claim" of illegality. In the Matter of the Grand Jury Subpoena Served upon Pedro Archuleta, No. 77-1286 (2d Cir. July 22, 1977), slip op. 5321, 5326-27; In re Millow, 529 F.2d 770, 774 (2d Cir. 1976); In re Vigil, 524 F.2d 209, 214 (10th Cir. 1975). No such claim was or has been made here. Moreover, in a case where, as here, the grand jury is seeking only nontestimonial evidence, the Ninth Circuit recently held that the belief by a recalcitrant witness that illegal electronic surveillance had been employed was not a defense to the charge of contempt. In re Grand Jury Witness (Whitnack v. United States), 544 F.2d 1245 (9th Cir. 1976). Liberatore's mere suggestion, therefore, that he may have been able to show that the evidence sought was the product of an illegal wiretap is entitled to no weight.

It is significant, we submit, that Liberatore has not raised in any concrete fashion any claim other than the defense of necessity which the district court rejected. Because Liberatore will be incarcerated until January 1978 regardless of the outcome of this appeal he is in the unique position of being able to raise a defense to his recalcitrance at any time prior to his

state release date. He has, however, failed to do so, even on appeal. His attempt to invalidate the court's order by claiming that he had insufficient time to prepare a defense, without revealing what that defense would be, substantiates, we submit, the Government's contention that he simply has no defense. Under these circumstances, Liberatore's claim should be rejected for he had and has had more than ample time to raise whatever defense there is. If there was any shortcoming in the district court's procedure, the error was harmless. See In re Grand Jury Investigation (Hartzell), supra, 542 F.2d at 168.

III.

The Government adequately demonstrated that the grand jury's request for exemplars of Liberatore's handwriting and fingerprints was proper.

Liberatore claims, finally, that the Government failed to show the necessity and relevance of the fingerprints and handwriting exemplars which the grand jury sought. Where, as here, however, a grand jury's directive to provide nontestimonial evidence does not infringe upon any interest protected by the Fourth or Fifth Amendments, the grand jury is not required to satisfy even a minimal showing of reasonableness for its request. United States v. Dionisio, supra, 410 U.S. at 15-16; United States

v. Mara, supra, 410 U.S. at 21-22; United States v. Doe (Schwartz), 457 F.2d 895, 900-901 (2d Cir. 1972), cert. denied, 410 U.S. 941 (1973). See also United States v. Caldwell, 408 U.S. 665, 708 (1972). This is so because a grand jury's investigation, if saddled with minitrials and preliminary showings, would become impeded and the public's interest in the fair and expeditious administration of the criminal laws frustrated. United States v. Dionisio, supra, 410 U.S. at 17. Therefore, whatever burden the Government may be under to make a preliminary showing, it is slight. United States v. Doe (Schwartz), supra, 457 F.2d at 901.

In the present case, the affidavit which the Government filed (App. 25-26) indicated that the grand jury was investigating the possible violation by Liberatore of 18 U.S.C. §§ 495 and 1708. Accordingly, the grand jury required exemplars of Liberatore's handwriting and fingerprints as a standard of comparison to determine whether he had forged, uttered or possessed the stolen treasury checks which were under consideration. The grand jury foreman testified, corroborating the information set forth in the Government's affidavit, and indicated that the grand jury was not seeking at this time fingerprints or handwriting samples in connection with these two checks from anyone other than Liberatore. This showing, we submit, clearly established that

the items sought were necessary and relevant to the grand jury's investigation and properly within its jurisdiction. There is no evidence to suggest that the grand jury was engaged in a fishing expedition or that the evidence was sought primarily for another purpose, as Liberatore implies. (Brief, at 39).

Liberatore places primary reliance upon the Third Circuit's opinions in In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973) and In re Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3d Cir. 1975), which require the Government to show that each item sought by the grand jury "is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose." Id. at 965. Such reliance, however, is misplaced for this court has never adopted this requirement. See United States v. Doe (Schwartz), supra. The Government's showing in this case, moreover, satisfied even the Third Circuit's standards, for, as Liberatore concedes (Brief, at 38), the Government met the relevancy requirement. A comparison of the affidavits filed by the Government here and in Schofield II, supra, 507 F.2d at 967, will further show that the requirements of jurisdiction and a proper purpose have been satisfied as well.

Grand jury proceedings are entitled to a presumption

of regularity. See In re Grand Jury Proceedings (Schofield I), supra, 486 F.2d at 92; Beverly v. United States, 468 F.2d 732, 743 (5th Cir. 1972); United States v. Dzialak, 441 F.2d 112, 217 (2d Cir.), cert. denied, 404 U.S. 883 (1971). In the absence of clear evidence to the contrary, this presumption should not lightly be set aside.

CONCLUSION

Judge Clarie's order was a proper exercise of the court's inherent and equitable power of contempt, as codified in 18 U.S.C. § 1826(a), and was clearly necessary to enforce the court's order as well as to protect and preserve the grand jury's historic and important function of investigating crime. Inasmuch as § 1826(a) provides for the confinement of a recalcitrant witness where the refusal to provide information is "without just cause", it was incumbent upon Liberatore to come forward and demonstrate "just cause" for his recalcitrance. See United States v. Handler, supra, 476 F.2d at 712. He did not and could not do so. Judge Clarie's order finding Liberatore in contempt should be affirmed in every respect.

Respectfully submitted,

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CERTIFICATION

This is to certify that a copy of the foregoing Brief was mailed postage pre-paid to Jon C. Blue, Legal Assistance to Prisoners, 340 Capitol Ave., Room 101, Hartford, Connecticut and to Richard S. Cramer, Esquire, Assistant Federal Public Defender, 450 Main Street, Hartford, Connecticut this 11th day of October, 1977.

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